



A C WHARTON, JR. - Mayor
GEORGE M. LITTLE - Chief Administrative Officer
LAW DIVISION
HERMAN MORRIS, JR. - City Attorney

October 31, 2013

Councilman Harold Collins
125 North Main Street, Suite 514
Memphis, Tennessee 38103

Dear Councilman Collins:

You have requested an opinion from this office concerning the following;

QUESTION

Whether the Memphis City Council can, adopt a resolution to allocate funding from the City's Capital Improvements Program budget to fund structural improvements to a privately owned facility?

ANSWER

No. The applicable portion of the City's CIP budget consists of General Obligation bond proceeds, to which the City's credit is pledged. Pursuant to Article II, Section 29 of the Tennessee Constitution, the city of Memphis is precluded from giving or lending its credit, or otherwise providing public funds to a private entity for a private benefit, without obtaining a majority vote from the citizens in an election on the matter. Furthermore, to the extent that the activity to be funded does not qualify as a public works project, pursuant to T.C.A. 9-21-105(21), general obligation bond proceeds cannot be expended for that activity.

STATEMENT OF THE FACTS

On or about October 1, 2013, the Memphis City Council approved a resolution to allocate \$1,500,000.00 for improvements to the facility formally known as Southbrook Mall ("the Mall,"), which is located at 1246 East Shelby Drive in Memphis, TN, in the Whitehaven area of Memphis. The property is currently owned and operated by Southbrook Properties Corporation, (the "owner"), a Tennessee not for profit corporation, who acquired the property in January, 2013.

As expressed during the Council meeting, the proposed plan for the Mall currently includes a revitalization effort, which, in conjunction with the economic development projects that are currently underway, will make the Mall a significant multipurpose anchor in Whitehaven. Some of the preliminary and proposed re-uses of the Mall include the establishment of a police precinct inside of the facility, other municipal service centers, retail, restaurant, and other entertainment opportunities. In addition, it is also envisioned that the Mall will serve as a venue to foster small business

development opportunities, and ultimately serve as a vehicle for increasing economic vitality in an area replete with authentic community assets.

In the furtherance of this development opportunity, the owner has requested approximately \$1.5 million dollars from the City of Memphis to cover a portion of the cost of structural improvements to the Mall facility, specifically the roof and HVAC system(s). On October 1, 2013, a resolution was presented and approved by the City Council which purported to amend the City's Capital Improvement Program Budget by transferring an allocation of \$1.5 million dollars from the PW 01064, the Elvis Presley / Shelby/ Winchester public works project to a new project entitled Southbrook Mall Improvements. Because Southbrook Mall, and the Southbrook Mall Corporation are both private entities, a determination must be made as to whether the proposed activity is eligible to receive an allocation from the City's Capital Improvements Program.

DISCUSSION

In its introductory narrative to the 2014-2018 CIP budget, the City defines the Capital Improvements Program, or CIP as a "multi-year plan for capital expenditures to replace and expand the City's infrastructure, vehicles and equipment," whose "purpose is to fund capital projects and capital acquisitions that will be of a long-term benefit to the citizens of Memphis." The narrative further provides that the Capital Improvement Budget is the annual allocation to the CIP that is set aside to fund major construction projects, acquire property, purchase equipment and fund ongoing capital programs for the City.

The CIP fund is primarily financed from three sources; 1) General Obligation Bonds, which are essentially credits that are backed by the full faith and taxing power of the City of Memphis, 2) Federal and State Grant Funds, which are provided to the City for specific, capital improvement projects, such as MATA projects and other local capital projects which may qualify for Federal, or State matching funds, or grants, and 3) Sewer funds, which are funds dedicated to the construction, maintenance, and repair of the City's sewer infrastructure. Because the Southbrook Mall project has not received any State or Federal infrastructure funding, nor any aspect of the project related to sewer infrastructure, it can be reasonably inferred that any allocation of CIP funds for that project would be subsidized by General Obligation ("G.O.") bonds. Therefore, this writing focuses on the G.O. bond financing stream of the CIP fund.

As stated, herein, general obligation bonds are securities that are supported by the City's full faith, credit and taxing power, and are further defined by T.C.A. 9-21-201(a) (2) as follows;

"General obligation bonds" mean those bonds in which the local government incurs a definite and absolute obligation by pledging the full faith, credit and unlimited taxing power of the local government as to all taxable property in the local government or of a portion of the local government, if applicable, to the payment of the principal of and interest on such bonds. (emphasis added)

Tennessee law gives significant latitude to local governments to issue GO bonds, provided

that such use is for one or more statutorily prescribed purposes, which are collectively defined as “public works projects” which are defined by T.C.A. 9-21-105(21)(A) and (B) as follows;

“Public works project” includes any one (1) or any combination of the following: abattoirs, acquisitions of land for the purpose of providing or preserving open land, airports, alleys, ambulances, auditoriums, bridges, city and town halls, local government stables or garages, community houses, corrective, detention and penal facilities, including, but not limited to, jails, workhouses and reformatories, courthouses, culverts, curbs, dispensaries, drainage systems, including storm water sewers and drains, electric plants and systems, expositions, facilities for the handicapped, including physically and mentally handicapped, facilities for the indigent, fairgrounds and fairground facilities, fire department equipment and buildings, fire alarm systems, flood control, garbage collection and disposal systems, gas and natural gas systems and storage facilities, heat plants and systems, harbor and riverfront improvements, health centers and clinics, including medical and mental health centers and clinics, highways, major roads, highway and street equipment, hospitals, hotels and supporting or incidental facilities built by local governments which are built adjacent to and as a supporting facility of civic or convention centers located in municipalities which have created a central business improvement district under the Central Business Improvement District Act of 1971, compiled in title 7, chapter 84, improvements made pursuant to a plan of improvement for a central business improvement district created pursuant to the Central Business Improvement District Act of 1971, law enforcement and emergency services equipment, levees, libraries, markets, memorials, museums, nursing homes, parks, parking facilities, parkways, playgrounds, plazas, port facilities, docks and dock facilities, including any terminal storage and transportation facilities incident thereto, public art, public buildings, preserves, railroads, including the extension of railroads, and railway beltlines and switches, reclamation of land, recreation centers and facilities, reservoirs, rights-of-way, river and navigation improvements, roads, sanitariums, schools, transportation equipment for schools, sewers, sewage and waste water systems, including, but not limited to, collection, drainage, treatment and disposal systems, ship canals, sidewalks, stadiums, streets, swimming pools, thermal transfer generating plants and/or distribution systems, tunnels, viaducts, voting machines, water treatment distribution and storage systems, wharves and zoos;

(B) “Public works project” also includes:

(i) “Business park,” which includes lands and rights, easements and franchises relating thereto, and may include roads and streets, water, sewer, electric and other utilities, landscaping and related elements as required for the orderly development and use of corporate or professional office space by one (1) or more commercial, financial or service business, and such appurtenant land for necessary incidental use. “Business Park” does not include a retail operation except for an incidental retail use. A “business park” shall contain not less than five (5) acres of land. The building finance committee in the industrial development division of the department of economic and community development is

authorized and empowered to determine whether a local government shall have the right to engage in any or all of the rights and privileges accompanying such a public works project. Before a local government may undertake the financing of such a public works project, it shall apply to the committee for a certificate of public purpose and necessity. The committee shall issue such a certificate once it is affirmatively determined that:

- (a) There are adequate property values and suitable financial conditions so that the total bonded indebtedness of the local government, solely for this authorized purpose and those other purposes authorized by title 7, chapter 55 and title 13, chapter 16, shall not exceed ten percent (10%) of the total assessed valuation of all the property in the local government ascertained by the last completed assessment at the time of the issuance of such bonds; and
- (b) The project is well conceived, has a reasonable prospect of success, will provide economic development and employment, will tend to encourage businesses to locate there and will not become a burden upon the taxpayers of the local government;

(ii) "Industrial park," which includes lands, rights, easements and franchises relating thereto, and may include adequate roads and streets, water and sewer facilities, utilities and docks and terminals. Any of the foregoing improvements which are to be located within the geographic boundaries of the industrial park may only be financed after compliance with title 13, chapter 16, part 2;

(iii) "Urban renewal project" which means the same as such projects which are defined in §§ 13-20-209 --13-20-215. Any local government is hereby authorized to contribute money, property, and municipal services to any public agency engaged in the development of urban renewal projects in that local government;

(iv) "Urban transit facility" which includes any or all real and personal property needed to provide public passenger transportation by means of street railway, electric railway, incline railroad, trolley coach, bus, motor coach, or any combination thereof, including terminal, maintenance and storage facility, whether owned and operated by a local

government or owned by a local government and leased to private operators, all of which are hereby found and determined to be in the public interest and a proper public purpose;

(v) Facilities for the storage and maintenance of any of the items of equipment which constitute public works projects; and

(vi) Facilities or capital expenditures paid or incurred with respect to property located in a "recovery zone," as defined in § 1400U-1(b) of the Internal Revenue Code of 1986, codified in 26 U.S.C. §1400U-1(b), that are made for a "qualified economic development purpose," as defined in §1400U-2(c) of the Internal Revenue Code of 1986, codified in 26 U.S.C. § 1400U-2(c);

(vii) Facilities or expenditures paid or incurred for "qualified conservation purposes," as defined in § 54D(f) of the Internal Revenue Code of 1986, codified in 26 U.S.C. § 54D(f), in connection with the issuance of "qualified energy conservation bonds," as

defined in § 54D of the Internal Revenue Code of 1986, codified in 26 U.S.C. § 54D; and

(viii) All property real and personal, appurtenant thereto or connected with any public works project, work or undertaking and the existing public works project, work or undertaking, if any, to which such public works project, work or undertaking is an extension, addition, betterment or improvement;

The above mentioned statutory analysis may be summarized by stating that CIP funds, or General Obligation bond proceeds may only be used by the City to fund public works projects such as those set forth in the Local Government Public Obligations Act of 1986, (T.C.A. 9-21101 et seq.), and, pursuant to Article II section 29 of the Tennessee Constitution, said proceeds cannot be allocated or expended for the sole benefit of a privately owned entity, without an election of the citizens of Memphis on the matter. The City's bond counsel, Steven Turner has also reviewed and opined on this Constitutional issue, which is attached to this correspondence.

The resolution approved by the Council On or about October 1, 2013 requested the transfer of \$1,500,000.00 in CIP funds from project PW01064, Elvis Presley Boulevard, Shelby Drive, and Winchester Road Improvement Project (an eligible use of CIP funds pursuant to the aforementioned statutes) to a new project – Southbrook Mall Improvements. The only other information offered with regard to the proposed renovations is that the Mall would be a potential site of the Raines Station Police precinct. As provided in the Act, in order for the project to be considered eligible for funding through the City CIP, the activity to be funded must be a statutorily defined public works project. To the extent that improvements and upgrades to a Mall, shopping center, or other retail support are not included in the litany of the statutorily prescribed activities which, pursuant to T.C.A. 9-21-105 have been determined to be public works projects, and to the further extent that the improvements for which funding has been requested are not a clear component of an approved redevelopment plan for a geographically defined area, nor do they purport to serve any clearly identified public purpose, an allocation of CIP funds for improvements and upgrades to such a privately owned facility as currently presented in the Council's October 1, 2013 resolution would be considered a loan of the City's full faith, credit, and taxing power, and as a result, pursuant to Art II Section 29 of the Tennessee Constitution require an election of the citizens of Memphis, and the assent of three fourths of those voting in said election in order to proceed.

CONCLUSION

Given the foregoing, it is the position of this office that the resolution approved by the City Council on October 1, 2013, which purported to transfer an allocation of \$1.5 million dollars from PW1064 Elvis Presley/Shelby/Winchester in order to create the new project entitled Southbrook Mall Improvements, does not present a public works project as set forth in T.C.A. 921-105(21), and thus should not be adopted in the form presented to the City Council. Please note however, that the position set forth herein does not constitute a prohibition of the project's ability to receive public funds from the City of Memphis, but only restricts the CIP funding source for the specific activity, in the manner presented pursuant to the resolution. With regard hereto, correspondence from Martin

Councilman Harold Collins

October 31, 2013

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Regan, Esq. is attached for further review and consideration.

Please do not hesitate to contact this office should you need further assistance.

Very truly yours,



Herman Morris, Jr.
City Attorney



Marcus D. Ward
Senior Assistant City Attorney

HMJ/MDW:st

cc: A C Wharton, Jr., Mayor
George M. Little, Chief Administrative Officer
Allan Wade, Esq., City Council Attorney
In-house attorneys

OPN. NO. : 022.13

Attachments:



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October 7, 2013

Mr. André Walker
Deputy Director of Finance-Debt Management
City of Memphis
Division of Finance
125 North Main Street, Room 368
Memphis, TN 38103-2084

Dear André:

You described to me in very general terms a proposal to fund, with proceeds of general obligation bonds, roof and HVAC improvements to a privately owned and operated commercial mall. The use of property tax-supported general obligation bond proceeds for such a direct private benefit likely is constrained by the lending of credit provisions in Article II, Section 29, of the Tennessee Constitution, which reads in part as follows:

"But the credit of no County, City or Town shall be given or loaned to or in aid of any person, company, association or corporation, except upon an election to be first held by the qualified voters of such county, city or town, and the assent of three-fourths of the votes cast at said election."

Whether other lawfully available funds of the City may be used for this purpose is subject to the same public purpose considerations applicable to all expenditures of public funds.

Very truly yours,

Steven I. Turner

SIT/ic



A C WHARTON, JR. - Mayor
GEORGE M. LITTLE - Chief Administrative Officer
LAW DIVISION
HERMAN MORRIS, JR. - City Attorney
DIVISION OF HOUSING & COMMUNITY DEVELOPMENT
ROBERT LIPSCOMB - Director
J. Martin Regan, Jr., Senior Staff Attorney

October 2, 2013

Herman Morris, City Attorney
City of Memphis
125 N. Main, Room 336
Memphis, TN 38103-2079

Re: 1245 Southbrook Mall

Dear Herman:

You have requested a legal opinion regarding whether it is appropriate for the City of Memphis to use CIP funds to repair the roof, HVAC system and property at what is commonly known as Southbrook Mall, using \$1.5 million to do the repairs, provided the property is owned by a non-profit and the property is to be "open to the public."

This matter has been reviewed with Steven I. Turner of Hawkins Delafield & Wood, LLP as Bond Counsel to the City. Further, I have reviewed this with Andre Walker, Deputy Director, Finance. Additionally, Marcus Ward has provided his input.

It is my opinion that the City of Memphis may provide a loan or financing to the owners of Southbrook Mall provided appropriate public purpose considerations are present. It is my opinion that Southbrook Mall plays an integral role in whether the properties, both commercial and residential, in the Elvis Presley and Shelby Drive area are stabilized or are permitted to deteriorate. That is, economic development and stabilization of communities are lawful public purposes for the expenditure of public funds. Any allocation of public funds should be accompanied by a finding by the City of Memphis that the funding is made expressly for economic development purposes and the funding to this specific site should be deemed an appropriate public purpose notwithstanding non-public ownership.

In order for the City of Memphis to provide funding for improvements to a privately owned and operated commercial mall there must be a precise and documented source of funds. That is, certain funds are "non-allowable" while other public funds lawfully may be expended for the desired improvements provided there is the economic development public purpose determined.

You have suggested the use of CIP funding wherein a portion of funds previously allocated to the Elvis Presley Boulevard development could be redirected to Southbrook Mall as part of an overall City collaboration with the Aerotropolis Project.

Financing of the CIP budget comes from sources that include long-term debt via General Obligation Bonds, Federal and State grants, and Sewer Funds as well as tax revenues. The City must assure solely the use of non-ad valorem revenue and no use of General Obligation Bond proceeds. It should restrict its sources to sales tax revenue, non-ad valorem revenue or its general fund available for economic development.

As noted by Bond Counsel, Stephen I. Turner, the use of property tax – supported general obligation bond proceeds may not be used for a direct private benefit as it is “constrained by Article II, Section 29, of the Tennessee Constitution” (copy attached). Specifically,

... the credit of no County, City or Town shall be given or loaned to or in aid of any person, company, association or corporation, except upon an election to be first held by the qualified voters of such county, city of town, and the assent of three-fourths of the votes cast at said election.

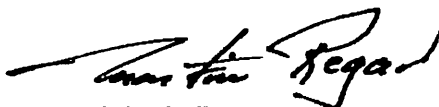
The Ferrell v. Doak case cited at 275 S.W. 29 is case law authority for the policy and law that expenditures of public funds restricted for a “public use” are constitutional only where “the accrual of a continued use for the public and a reasonable degree of public regulation or control, independent of the will of the private party who is the beneficiary” exists.

Also applicable is TCA § 9-21-105 pertaining to public finances. Here an allowable “Public Works Project” includes a business park; however, it expressly excludes any “retail operation except for an incidental retail use.”

Taking guidance from the above “non-allowable uses,” the City may craft funding with “allowable” dollars provided such “allowable” dollars are available within the CIP funding account. That is, non-bond proceeds and non-ad valorem revenue should be utilized from the general fund expressly for the declared public use of economic development.

Let me know if you have questions in connection with this opinion or if anything further is needed.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Martin Regan, Jr.", with a stylized flourish at the end.

J. Martin Regan, Jr.
Senior Staff Attorney

JMR/mlt

Sec. 29. Counties and towns — Power to tax — Credit. — The General Assembly shall have power to authorize the several counties and incorporated towns in this State, to impose taxes for County and Corporation purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to State taxation. But the credit of no County, City or Town shall be given or loaned to or in aid of any person, company, association or corporation, except upon an election to be first held by the qualified voters of such county, city or town, and the assent of three-fourths of the votes cast at said election. Nor shall any county, city or town become a stockholder with others in any company, association or corporation except upon a like election, and the assent of a like majority. But the counties of Grainger, Hawkins, Hancock, Union, Campbell, Scott, Morgan, Grundy, Sumner, Smith, Fentress, Van Buren, and the new County herein authorized to be established out of fractions of Sumner, Macon and Smith counties, White, Putnam, Overton, Jackson, Cumberland, Anderson, Henderson, Wayne, Cocke, Coffee, Macon, Marshall, and Roane shall be excepted out of the provisions of this Section so far that the assent of a majority of the qualified voters of either of said counties voting on the question shall be sufficient when the credit of such county is given or loaned to any person, association or corporation; Provided, that the exception of the counties above named shall not be in force beyond the year one thousand eight hundred and eighty; and after that period they shall be subject to the three-fourths majority applicable to the other counties of the State.

Section to Section References. This section is referred to in § 29-20-403.

Cross-References. County becoming stockholder, title 65, ch. 7.

Incorporated town becoming stockholder, title 65, ch. 7.

Law Reviews. Impact Fees in Tennessee, a Public and Private Partnership (Andrea C. Barach, Jane Pine Wood), 18 Mem. St. U.L. Rev. 685 (1988).

Attorney General Opinions. City development of residential real estate, OAG 98-042 (2/17/98).

State building commission may not impose or increase local taxes, 98-066 (3/18/98).

Use of municipal funds to clear debris on residential property, OAG 98-0101 (5/27/98).

Municipal authority to make or guarantee loans to local housing authority, OAG 98-0104 (6/11/98).

Authority of municipal utility division to furnish propane service, OAG 98-0175 (8/28/98).

Use of public funds to maintain private roads to private cemeteries, OAG 99-097 (4/27/99).

Authority of the legislature to direct valuation methods for low-income residential property under Tenn. Const. art. II, §§ 28 and 29, OAG 00-066 (4/5/00).

A county may, without an election, either: (1) Contract with a private entity to allow that entity to have the exclusive right to attach its

name or logo to a publicly financed facility; or (2) Sell or lease advertising space at the facility to one or more private entities without violating the section, OAG 01-003 (1/4/01).

The legislature does not have the power to create a group or commission to set or regulate state taxes, OAG 01-172 (12/18/01).

Authority of school board to hold referendum on county property tax rate, OAG 04-125 (8/10/04).

Cited: Bell v. Town of Pulaski, 182 Tenn. 136, 184 S.W.2d 384, 1945 Tenn. LEXIS 204 (1945); McCord v. Nashville, C. & St. L. Ry., 187 Tenn. 277, 213 S.W.2d 196, 1948 Tenn. LEXIS 429 (1948); Illinois C. R. Co. v. Garner, 193 Tenn. 91, 241 S.W.2d 926, 1951 Tenn. LEXIS 327 (1951); Louisville & N.R.R. v. Public Serv. Comm'n, 249 F. Supp. 894, 1966 U.S. Dist. LEXIS 10536 (M.D. Tenn. 1966); State by Shriver v. Dunn, 496 S.W.2d 480, 1973 Tenn. LEXIS 480 (Tenn. 1973); Ledbetter v. Duncan, 676 S.W.2d 91, 1984 Tenn. App. LEXIS 2776 (Tenn. Ct. App. 1984); Marion County v. State Bd. of Equalization, 710 S.W.2d 521, 1986 Tenn. App. LEXIS 2768 (Tenn. Ct. App. 1986); State ex rel. Weaver v. Ayers, 756 S.W.2d 217, 1988 Tenn. LEXIS 273 (Tenn. 1988); Tennessee Small Sch. Sys. v. McWhorter, 851 S.W.2d 139, 1993 Tenn. LEXIS 114 (Tenn. 1993); Vandergriff v. City of Chattanooga, 44 F. Supp. 2d 927, 1998 U.S. Dist. LEXIS 22102 (E.D. Tenn. 1998).

ing, but not limited to, collection, drainage, treatment and disposal systems, ship canals, sidewalks, stadiums, streets, swimming pools, thermal transfer generating plants and/or distribution systems, tunnels, viaducts, voting machines, water treatment distribution and storage systems, wharves and zoos;

(B) "Public works project" also includes:

(i) "Business park," which includes lands and rights, easements and franchises relating thereto, and may include roads and streets, water, sewer, electric and other utilities, landscaping and related elements as required for the orderly development and use of corporate or professional office space by one (1) or more commercial, financial or service business, and such appurtenant land for necessary incidental use. "Business park" does not include a retail operation except for an incidental retail use. A "business park" shall contain not less than five (5) acres of land. The building finance committee in the industrial development division of the department of economic and community development is authorized and empowered to determine whether a local government shall have the right to engage in any or all of the rights and privileges accompanying such a public works project. Before a local government may undertake the financing of such a public works project, it shall apply to the committee for a certificate of public purpose and necessity. The committee shall issue such a certificate once it is affirmatively determined that:

(a) There are adequate property values and suitable financial conditions so that the total bonded indebtedness of the local government, solely for this authorized purpose and those other purposes authorized by title 7, chapter 55 and title 13, chapter 16, shall not exceed ten percent (10%) of the total assessed valuation of all the property in the local government ascertained by the last completed assessment at the time of the issuance of such bonds; and

(b) The project is well conceived, has a reasonable prospect of success, will provide economic development and employment, will tend to encourage businesses to locate there and will not become a burden upon the taxpayers of the local government;

(ii) "Industrial park," which includes lands, rights, easements and franchises relating thereto, and may include adequate roads and streets, water and sewer facilities, utilities and docks and terminals. Any of the foregoing improvements which are to be located within the geographic boundaries of the industrial park may only be financed after compliance with title 13, chapter 16, part 2;

(iii) "Urban renewal project" which means the same as such projects which are defined in §§ 13-20-209 — 13-20-215. Any local government is hereby authorized to contribute money, property, and municipal services to any public agency engaged in the development of urban renewal projects in that local government;

(iv) "Urban transit facility" which includes any or all real and personal property needed to provide public passenger transportation by means of street railway, electric railway, incline railroad, trolley coach,